Decision 02-10-007 October 3, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Dairyman's Division of Land O'Lakes, Inc., Complainant, vs. Southern California Edison Company, Defendant.	Case 01-10-034 (Filed October 31, 2001)

Livingston & Mattesich Law Corporation, by Terry A. German, Attorney at Law, for Dairyman's Division of Land O'Lakes, Inc., Complainant.
Southern California Edison Company, by David R. Garcia, Attorney at Law, Defendant.

OPINION ON BILLING EXCESS ENERGY CHARGES UNDER AN INTERRUPTIBLE TARIFF

I. Summary

Did Southern California Edison Company (SCE) violate provisions of its Tariff Schedule I-6 (Schedule) by assessing excess energy charges (penalties) on Dairyman's Division of Land O'Lakes, Inc. (Land O'Lakes) for not curtailing energy usage on five separate occasions within a four-day period? On the facts and circumstances of this case, we determine that the answer is no. The amount on deposit with the Commission should be released to SCE. This complaint should be denied.

II. Background

Land O'Lakes receives electrical service for its Dairyman's Creamery, a large milk receiving and manufacturing plant in Tulare, California, from SCE under an Interruptible Rate Program. Under that schedule, Land O'Lakes receives a discounted energy usage rate and is exempted from rotating outages in exchange for Land O'Lakes curtailing energy usage to a firm service level of zero within a 30-minute notice from SCE.[1] Failure to reduce energy load to the firm service level during a period of interruption subjects Land O'Lakes to significant excess energy charges.

SCE issued nine separate notices of interruption to the Dairyman's Creamery totaling 42 hours over a four-day period from January 16, 2001 to January 19, 2001. SCE billed Land O'Lakes $1,516,192.82 in excess energy charges because Land O'Lakes failed to curtail energy usage to its firm service level on each occasion.

Land O'Lakes, not disputing the excess charges calculation, paid SCE $619,761.60 for four of those nine notices, the first notice on each of the consecutive four days. The remaining $896,431.22 is on deposit with the Commission. This deposit pertains to the remaining five notices, namely, the second notice on January 16, 2001 and the second and third notices on both January 17, 2001 and January 18, 2001.

[1] The firm service level is the maximum demand that SCE is expected to serve during a period of interruption. That firm service level was set by Land O'Lakes at the time it elected service under the Schedule I-6 program.

III. Issues

The issues are whether SCE properly noticed Land O'Lakes and whether SCE properly interpreted the Schedule in billing Land O'Lakes $898,431.22 in excess energy charges.

A. Notice

Land O'Lakes asserts that SCE assessed excess energy charges "for the five Periods of Interruption declared without the required 30-minute minimum notice." [2]

Although a notice requirement is set forth in the Schedule that existed at the time, there is no required 30 minute "minimum" notice. Special Condition 5 of that Schedule specifies "Upon receipt by a customer of a Notice of Interruption from the Company, the customer shall reduce the Maximum Demand imposed on the electric system to the Firm Service Level within [emphasis added] 30 minutes."

Upon completion of their respective discovery requests, Land O'Lakes and SCE filed a "Joint Stipulation of Facts." Fact No. 17 states that SCE provided Land O'Lakes notice thirty-three minutes prior to the start of the second energy curtailment on January 16, 2001. Fact Nos. 19 and 22 state that SCE provided Land O'Lakes a thirty-one minute notice prior to the start of the second energy curtailment on January 16, 2001 and 18, 2001. Finally, Fact Nos. 20 and 23 state that SCE provided Land O'Lakes a thirty-one minute notice prior to the start of the third energy curtailment on January 17, 2001 and 18, 2001.

The stipulated facts affirm that Land O'Lakes received proper notice from SCE, irrespective of whether the interpretation of Land O'Lakes or the

[2] *See* page 6 of Complaint.

actual specification of the Schedule is used as a benchmark to determine proper notice.

B. Tariff Interpretation

Interruptible rates have been available options to SCE's customers for a number of years prior to 1987. The Schedule was established by a Commission decision involving five days of public hearings with statements from 55 public witnesses and 53 days of evidentiary hearings with testimony from 96 expert witnesses and 317 exhibits.[3] The purpose of the Schedule is to encourage customers to reduce electric usage during times when demand for energy is high. As an incentive to reduce energy demand, the Schedule allows a customer who has less need for guaranteed service reliability to receive a lower energy usage rate in exchange for interruptions in that customer's service to a firm service level. Upon a notice of interruption, that customer is expected to reduce its energy demand to its firm service level. The lower the firm service level selected by the customer, the higher the energy discount.

Although its large milk receiving and manufacturing plant is subject to regulatory sanitary standards, Land O'Lakes opted to forego guaranteed service reliability at the time it selected service under the Schedule. The terms of that schedule were specific. It would receive a discounted service rate for forgoing service to its firm service level when called upon by SCE. Because Land O'Lakes selected a zero firm service level, it agreed to forgo all service from SCE during periods of interruption. Land O'Lakes selected the zero level even though it had no back-up generation facilities until May 2001, to replace its loss of service.

[3] 26 CPUC2d 392 at 409.

During the time when the disputed interruptions occurred, and prior to April 14, 2001, the Schedule defined a period of interruption to commence within 30 minutes after a customer receives notice of an interruption and continuing up to a six-hour duration for each occurrence. The number of interruptions was limited to a maximum of 25 occurrences and 150 hours per calendar year.[4]

1. Ambiguity

Land O'Lakes acknowledges these provisions but claims they are ambiguous by failing to state limits on the frequency of interruption in terms of number per day, week or month. It contends that that ambiguity placed Land O'Lakes in an untenable position because SCE scheduled nine successive back-to-back periods of interruption that resulted in more than 42 hours of scheduled interruption over four consecutive days. That untenable position was in deciding between paying higher energy rates via excess energy charges in order to comply with regulatory sanitary standards for its production of dairy products[5] or shutting down its operation.

Land O'Lakes relies on prior Commission rulings, including Decision (D.) 01-04-006 dated April 3, 2001, to support its contention that the language in SCE's Schedule was ambiguous and unreasonable. That decision, among other matters, modified the frequency of permitted curtailments in SCE's Schedule by limiting such curtailments to one six-hour event per day, not to

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[4] *See* Special Condition 5 of Schedule I-6.

[5] *See* for example Section 32501 *et seq.* of the California Milk and Milk Products Act of 1947 and the United States Department of Health and Human Services Grade "A" Milk Ordinance.

exceed a total of four occurrences in any one calendar week, 40 hours per month, for a maximum total of 150 hours per calendar year.[6]

Land O'Lakes does not contend that the modifications ordered in D.01-04-006 should be applied retroactively in this proceeding. However, it does contend that that decision is "probative to the present dispute because it represents the Commission's findings and conclusions with respect to the uncertainty and ambiguity by the lack of any express limits on Periods of Interruption per day, week and month."[7] Land O'Lakes also contends that that decision "represents the Commission's interpretation and findings with respect to Schedule I-6 as interpreted and applied by SCE and others in January 2001."[8]

Land O'Lakes concludes that SCE's express interpretation of the Schedule results in an absurd situation of being required to decide whether to pay excess energy charges or to shut down its business. To resolve that situation, Land O'Lakes seeks a limitation of no more than one period of interruption per day, thereby allowing both the six-hour per day and 150-hour per year limitations to coexist while making the interruptible contract reasonable in Land O'Lakes' view.

SCE sees no ambiguity in the Schedule. Per SCE, Land O'Lakes, in choosing to receive a discounted rate under the Schedule, agreed to comply with notices of interruptions in the maximum amount of 25 occurrences or 150 hours

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[6] SCE's Tariff Schedule I-6 changes as set forth in D.01-04-006, Section 1.2 of Appendix A at page 2.

[7] Page 10 of reply brief.

[8] Page 11 of reply brief.

per year. Those limits were not reached when Land O'Lakes received its notices during the four consecutive days. Hence, SCE assessed excess energy charges.

D.01-04-006 was not intended to and does not represent the Commission's interpretation and findings with respect to the Schedule as applied in January 2001. That decision was the result of a reassessment of the Schedule and other interruptible programs in light of the continuing electric crisis in California. We recognized that "SCE customers were in particular pressed to the limit by the number and duration of interruption calls. Customers faced an irreconcilable dilemma of choosing to curtail electric service almost continuously, or paying significant penalties…. As a result we limit exposure to interruptions to reasonable limits per day, week and month so that the **remaining portions of these programs are useful for the remainder of 2001 and 2002,** without unreasonable burdens on customers (emphasis added)."[9]

In terms of retroactive relief, D.01-04-006 provided interruptible customers the ability to opt-out or readjust their firm service level back to November 1, 2000. By opting-out of the Schedule, customers would be required to repay the discounts received from November 1, 2000 through the present, but not pay any otherwise incurred penalties for failure to curtail when asked during that time.[10] Land O' Lakes chose neither to opt-out of the Schedule nor to readjust its firm service level of zero. The Schedule is not ambiguous, however, and nothing that we found or ordered in D.01-04-006 suggests otherwise.

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[9] D.01-04-006, *mimeo.*, page 20.

[10] *Id.*, Conclusion of Law 5, *mimeo.*, page 90.

2. Accountability

Land O'Lakes, relying on the California Civil Code[11] and Lennox Industries v. California Cartage Co. Inc. (1980) 4 CPU2d 26, contends that the alleged ambiguity should be held against SCE, the party who caused the ambiguity to exist. As we find that the Schedule is unambiguous, those arguments are moot.

IV. Procedural History

A Prehearing Conference (PHC) held on February 7, 2002 was continued to March 8, 2002 to permit Land O'Lakes and SCE time to conduct discovery, prepare stipulated facts, and to determine whether an evidentiary hearing is needed. Subsequently, on March 19, 2002 the parties filed a joint stipulation of facts.

Upon the parties' concurrence at the continued PHC that an evidentiary hearing was not necessary, a briefing schedule was established. Land O'Lakes filed its opening brief on May 13, 2002 and SCE filed its opening brief on May 28, 2002. This complaint was deemed submitted upon the receipt of Land O'Lakes' June 7, 2002 reply brief.

V. Comments on Draft Decision

The draft decision of ALJ Galvin in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Land O'Lakes filed comments and SCE filed reply comments on the ALJ's Draft Decision. The comments and reply comments were carefully reviewed and considered. To the extent such

[11] California Civil Code §§ 1643, 1654 and 1655.

comments required discussion or changes to the draft decision, the discussion or changes have been incorporated into the body of this order.

VI. Assignment of Proceeding

Carl Wood is the Assigned Commissioner and Michael Galvin is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Land O'Lakes receives electrical service for its Dairyman's Creamery from SCE under an Interruptible Rate Program. That program provides Land O'Lakes with a discounted energy usage rate and exempts it from rotating outages in exchange for curtailing energy usage to a firm service level within a 30-minute notice of interruption from SCE.

2. SCE issued nine separate notices of interruption to Land O'Lakes totaling 42 hours over a four-day period.

3. Land O'Lakes failed to curtail energy usage to its firm service level for any of the nine periods of interruption.

4. SCE billed Land O'Lakes $1,516,192.82 in excess energy charges, of which Land O'Lakes paid $619,761.60.

5. Land O'Lakes disputes the remaining $896,431.22 of billed excess energy charges pertaining to five separate notices of interruption. That amount is on deposit with the Commission.

6. Land O'Lakes and SCE stipulated that each of SCE's disputed curtailment notices were provided more than 30 minutes before the start of energy curtailment.

7. The Schedule defines a period of interruption to commence within 30 minutes after a customer receives notice of an interruption and continuing up to a six-hour duration for each occurrence. The number of interruptions was

limited to a maximum of 25 occurrences and 150 hours per calendar year. The Schedule is unambiguous.

8. The purpose of the Schedule is to encourage customers to reduce electric usage during times when demand for energy is high.

9. The Schedule allows a customer who has less need for guaranteed service reliability to receive a lower energy usage rate in exchange for interruptions in that customer's service to a firm service level.

10. The lower the firm service level, the higher the discount.

11. Land O'Lakes is a large milk receiving and manufacturing plant subject to regulatory sanitary standards.

12. Land O'Lakes selected a zero firm service level, agreeing to forgo all services from SCE during periods of interruption, even though Land O'Lakes had no back-up facilities to replace its loss of service.

13. D.01-04-006 limited exposure to interruptions to reasonable limits per day, week and month so that the remaining portions of the interruptible programs are useful for the remainder of 2001 and 2002.

14. D.01-04-006 provided customers the ability to opt-out or readjust their firm service level back to November 1, 2000.

15. Land O'Lakes chose not to opt-out of the Schedule or to readjust its firm service level of zero.

Conclusions of Law

1. A hearing is not necessary. This complaint can be resolved on the record that already exists, consisting of pleadings and briefs.

2. The complaint fails to state a violation of any provision of law or of any order or rule of the Commission, as required by Pub. Util. Code § 1702.

3. This case should be dismissed and the dismissal made effective immediately so that SCE may recover the money deposited with the Commission as soon as possible.

O R D E R

IT IS ORDERED that:

1. The complaint of Dairyman's Division of Land O'Lakes, Inc. (Land O'Lakes) against Southern California Edison Company (SCE) in Case (C.) 01-10-034 is denied.

2. Land O'Lakes' $896,431.22 deposit with the Commission shall be disbursed to SCE within fifteen days from today. SCE shall also receive all interest accumulated on the deposit.

3. C.01-10-034 is closed.

This order is effective today.

Dated October 3, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners